IN THE

Supreme Court of the United States

OCTOBER TERM—1942

No. 721.

THE NORTH AMERICAN COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

CHARLES E. HUGHES, JR.,
Counsel for Petitioner.

SULLIVAN & CROMWELL,
Of Counsel.

March 25, 1943.

CONTENTS

CASES CITED

STATUTORY PROVISIONS CITED

MISCELLANEOUS CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM—1942

No. 721.

THE NORTH AMERICAN COMPANY,
Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

Writ of certiorari was granted by this Court to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on January 28, 1943.

That decree affirmed orders of the Securities and Exchange Commission (hereinafter called the "Commission") entered in a proceeding initiated by the Commission under Section 11(b)(1) of the Public Utility Holding Company Act of 1935, by notice of and order for hearing (R., Vol. I, 1-33) on March 8, 1940.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R., Vol. X, 4000-4010) is unreported as yet.

The Commission's Findings and Opinion (R., Vol. I, 73-193), and Orders dated April 14, 1942 (R., Vol. I, 194-204) and June 25, 1942 (R., Vol. I, 214-217) are its Holding Company Act Releases Nos. 3405 and 3629, which are not yet officially reported.

STATUTE INVOLVED

The statute involved is Title I of the Public Utility Act of 1935 entitled "An Act to provide for control and regulation of public-utility holding companies, and for other purposes", 49 Stat. 803 (hereinafter called the "Act").

The provision thereof which is directly involved, and under which the orders of the Commission were entered, is Section 11(b)(1) which provides as follows:

> "(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:
>
> (1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a regis-

tered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems."

A sufficient number of copies of the entire Act for the Court were filed with the petition for certiorari.

JURISDICTION

The decree of the Circuit Court of Appeals for the Second Circuit under review was entered on January 28,

1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, made applicable by Section 24(a) of the Act.

The writ of certiorari was granted by this Court on March 1, 1943.

QUESTIONS PRESENTED

1. Is Section 11(b)(1) of the Act within the power of Congress, under Article I, section 8, clause 3 of the Constitution, to regulate commerce among the several States?

2. Does Section 11(b)(1) of the Act violate the due process clause of the Fifth Amendment?

STATEMENT

The decree of the Circuit Court of Appeals, here under review, affirmed two orders of the Commission.

The order of April 14, 1942 directs the petitioner to divest itself of all its assets other than securities of Union Electric Company of Missouri, except that the Commission reserved jurisdiction hereafter to enter an order directing petitioner to divest itself of securities of St. Louis County Gas Company and of 60 Broadway Building Corporation. The assets of which petitioner is ordered to divest itself cost it approximately $190,000,000. The order of June 25, 1942 refused permission to the petitioner to choose for itself the integrated public utility system which it might retain.

The petitioner, a New Jersey corporation with its business office in New York City, was organized in 1890 and has since continuously engaged in the business of acquiring

and holding for investment stocks and other securities, principally in the electric utility field. It has no other business. (R., Vol. VI, 2084-5; Vol. VII, 2807; Vol. VIII, 2925).

Petitioner registered under Section 5 of the Act on February 25, 1937 (reserving its constitutional rights),* and is thus a "registered holding company" within the meaning of Section 11(b)(1).

The investments of petitioner dealt with by the Commission's opinion, findings and order are set out in Appendix A hereto.

Petitioner's direct and indirect investments in *utilities engaged in interstate commerce* are:

Wisconsin Electric Power Company: An electric utility company which, with its subsidiaries, operates in and around Milwaukee and to the north, including an area in the upper peninsula of Michigan. Petitioner's investment, which consists of 94% of the common stock, commenced in 1890. (R., Vol. III, 838-9; Vol. VII, 2832; SEC Holding Company Act Release 2950).

Union Electric Company of Missouri: An electric utility company which, with its subsidiaries, operates in and around St. Louis, Missouri, including adjacent Illinois territory. Petitioner's investment, which consists of all of the common stock, commenced in 1901. (R., Vol. I, 91, 92). Petitioner also directly owns all of the stock of The St. Louis County Gas Company, a relatively small company

*See *Landis* v. *The North American Company*, 299 U. S. 248, 251-252; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 435.

which furnishes gas service in St. Louis County, a suburban county in Missouri, which does not include the city of St. Louis (R., Vol. V, 1870).

Washington Railway and Electric Company: A holding company which holds all of the common stock of Potomac Electric Power Company, an electric utility company which serves the District of Columbia and an adjoining area in Maryland, and of a minor company which serves a small adjacent area in Virginia, together with 50% of the capital stock of Capital Transit Company, which furnishes street car and bus service in the District of Columbia. Petitioner's investment, which consists of 80% of the common stock, commenced in 1924 (R., Vol. I, 132-4; Vol. VII, 2826).

North American Light & Power Company: A holding company which holds stocks of electric utility companies and gas utility companies operating in Kansas, Missouri, Illinois and Iowa. This holding company is in process of dissolution; and petitioner will eventually receive such proceeds of liquidation as are applicable to its holdings of securities of various classes. This investment commenced in 1926. (R., Vol. I, 139; Vol. VII, 2826).

Petitioner's investments in *utilities not engaged in interstate commerce* are:

The Cleveland Electric Illuminating Company: An electric utility company which serves Cleveland and the surrounding area. Its business is confined within Ohio. Petitioner's investment, which consists of 79% of the common stock, commenced in 1922. (R., Vol. II, 327, 646-50; Vol. VII, 2826).

Pacific Gas and Electric Company: An electric utility company which, with its subsidiaries, operates in and around San Francisco and to the north. Its business is confined within California. Petitioner's ownership, which consists of 33% of the common stock, represents an investment which started in 1925. (SEC Holding Company Act Release 2988).

The Detroit Edison Company: An electric utility company which serves Detroit and the surrounding area. Its business is confined within Michigan. Petitioner's investment, dating from 1903, at the time of commencement of the proceedings consisted of 19.2% of the capital stock. (R., Vol. I, 93; SEC Holding Company Act Release 4056). By April 2, 1943, this holding will have been reduced to less than ⅛ of 1%.

Petitioner's investment in *non-utilities engaged in interstate commerce* is:

West Kentucky Coal Company: A company which owns and operates coal mines in Kentucky and sells coal, partly through subsidiary selling companies, in several states. Very little of this company's coal has been sold to utility companies in which petitioner holds investments. Petitioner's investment, which consists of most of the preferred stock and 100% of the common stock, commenced in 1905. (R., Vol. I, 123; Vol. VII, 2858).

Petitioner's investments in *non-utilities not engaged in interstate commerce* are:

North American Utility Securities Corporation: A relatively small investment company. Petitioner's interest, which consists of all of the preferred stock and 80% of the common stock, commenced in 1924. (R., Vol. I, 119, 120).

60 Broadway Corporation: A company whose only asset is the office building in New York where petitioner has its offices. Petitioner's investment, which consists of 100% of the capital stock, commenced in 1924. (R., Vol. I, 121, 122).

Miscellaneous investments covered by the order also include:

$120,000 of 5% Notes of Capital Transit Company;

4,700 shares of preferred stock of Illinois Iowa Power Company;

An investment of $400,000 in Milwaukee Light, Heat & Traction Company whose sole assets are real estate held for liquidation and stock of a small electric furnace enterprise. (R., Vol. IV, 1507-8).

It will be noted from the foregoing summary that petitioner's investments have been continuous and are of long standing. In making and retaining its investments in the Wisconsin, St. Louis, Cleveland, Washington, Detroit and California areas, petitioner has long followed a policy of diversification which has proved sound and of substantial value to its security holders. (R., Vol. VII, 2831-2; Vol. VIII, 3013-4).

Petitioner has at no time engaged in the business of managing the operations of its public utility operating subsidiaries, or selling them supplies, engineering services or the like. Its relationship has, essentially, been that of a large investor seeking to promote the sound development of his investment. Petitioner has consistently proclaimed and practiced the policy of local autonomy for each public utility operating company and has sought to use its voting power to assure good local management which has had the

genuine responsibility of conducting operations. Petitioner has furnished financial advice and assistance and sponsored the interchange of valuable operating information among the subsidiaries. (R., Vol. I, 100-1; Vol. VIII, 2903, 2922).

Petitioner has been conservatively financed and its financial practices have been sound. There has never been a default on any security issued by petitioner. (R., Vol. VII, 2815, 2869-70; Vol. VIII, 2892-3). Residential electric rates charged by petitioner's operating utility subsidiaries are far below the national average and among the lowest in the country. (Petitioner's Exhibits 124, 141, R., Vol. IX, 3284, 3310).

Petitioner itself has accepted the strictest and most comprehensive regulation by the Commission, while its utility subsidiaries have been completely regulated for many years by the respective State commissions.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In holding that Section 11(b)(1) of the Act is within the power of Congress to regulate commerce among the several States.

2. In holding that Section 11(b)(1) of the Act is not violative of the Fifth Amendment to the Constitution.

ARGUMENT

FIRST. SECTION 11(b)(1) OF THE ACT IS NOT WITHIN THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES. SINCE THE OWNERSHIP OF SECURITIES IS NOT COMMERCE, IT IS NOT SUBJECT TO THE COMMERCE POWER UNLESS BY REASON OF ITS EFFECT ON INTERSTATE COMMERCE, AND NO SUCH EFFECT HAS BEEN FOUND.

(a) Introduction and summary of argument.

In holding that Section 11(b)(1) is within the power of Congress under the commerce clause, the Circuit Court of Appeals has pressed the scope of that source of federal power far beyond anything yet decided by this Court and far beyond the limits clearly indicated by its decisions.

In contrast with all of the other enactments which this Court has upheld under the commerce clause, the statutory criteria governing the application of Section 11(b)(1) have nothing whatever to do with interstate commerce or effect thereon. That section requires divestment by a holding company (whether or not engaged in or having any relation to interstate commerce) of all securities owned by it in other corporations (whether or not those other corporations be engaged in or have any relation to interstate commerce), except the securities of corporations whose relations to the holding company meet certain statutory tests (which tests also have no relation to interstate commerce or effect thereon). It requires such divestment whether or not the prohibited ownership by holding companies of such securities has substantial, or any, effect on interstate commerce or tendency to obstruct the power of Congress over it.

Certainly the ownership by one corporation of securities in other corporations is not in itself commerce, interstate or intrastate. The right to own or retain the ownership of property is characteristically a matter governed by the laws of the several States, with which the federal government has no concern except as an incident to the due exercise of one of the granted powers.

It follows that an enactment proscribing such ownership may not be upheld as an exercise of the commerce power unless it falls within the rule of which the following extract from this Court's opinion in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119, is the most recent comprehensive formulation:

> "* * * The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. [Citing cases]. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

In *Wickard* v. *Filburn*, 87 L. Ed. 57, this Court repeated (p. 64) the above quotation and added (p. 65):

> "* * * But even if appellant's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'."

But this rule does not come into play at all unless the prerequisite condition of substantial effect on interstate commerce, or on the power of Congress to regulate it, satisfactorily appears. Where, as here, the connection between the forbidden conduct and interstate commerce is not self-evident, there must be a finding of the required effect by either a court, an administrative agency or Congress itself.

In *United States* v. *Darby,* 312 U. S. 100, this Court (pp. 119-121) divided the instances of congressional regulation "of activities intrastate which have a substantial effect on the [interstate] commerce or the exercise of the Congressional power over it" into three categories, as follows:

> "In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act [the Fair Labor Standards Act of 1938], the Safety Appliance

> Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States* v. *Ferger, supra; Virginian Ry. Co.* v. *Federation,* 300 U. S. 515, 553."

The Act here in question does not fall within either of the first two categories. It does not leave the required determination to the courts. The only hearing on the facts for which it provides is one before the Commission; and it neither requires nor contemplates that the Commission shall make findings on the question whether interstate commerce is affected. The obvious reason it does not is that the prohibitions of Section 11(b)(1) apply regardless of any such effect. Congress did not intend that the Commission should make, either as to North American specifically or as to holding companies generally, findings which would be irrelevant under the statute which it was administering. The Commission in fact made no findings on the subject of any effect on interstate commerce of the prohibited security holdings. In all the 105 pages of its Findings and Opinion (R., Vol. I, 73-178) no such effect is so much as mentioned, and the term "interstate commerce" is not once used. Such occasional references as there are to the business or operations of some of the corporations being in more than one state are descriptive only.

The sole remaining question, therefore, is whether Congress has itself made a finding that the "particular activity" in question,—here the ownership of securities of other corporations,—affects interstate commerce to the required degree. Such a finding would in any event not be con-

clusive on the courts. If it were, the "function of courts" in passing on legislation in the third category would have been described as being only to see whether Congress had in words so found, not as being to "determine" whether the subject of the prohibition "is within the reach of the federal power". But a congressional finding of the required effect is a *sine qua non*. The Circuit Court of Appeals thought the declarations in Section 1 of the Act sufficient for this purpose. We submit that they are not.

We submit that neither the decisions above referred to, nor the other decisions in which this Court has applied the same rule, support this legislation. They concerned enactments which established, and provided machinery to carry out, policies for the regulation of interstate commerce and the prevention of burdens thereon. The regulation of intrastate matters was incidental, and only such as was required to make the interstate-commerce policies effective. The application of those statutes was limited, either by their express terms or by their administration, to acts which were done in the course of interstate commerce or were satisfactorily found to have a substantial adverse effect thereon.

But in the case of the Act here in question the very policy which it establishes is not a policy for interstate commerce. It is a policy supposed to promote general public welfare, which Congress has sought to give an appearance of constitutional foundation by reference to the fact that some of those subject to it are engaged in interstate commerce, or in activities of a wholly unspecified character which affect interstate commerce.

We proceed now to develop more fully the several propositions which we have stated summarily above.

(b) Section 11(b)(1) applies regardless of any relation of the prohibited property ownerships to interstate commerce or of any effect thereon.

(1) *The statutory definitions of terms.*

The requirement by Section 11(b)(1) of limitation of the operations of the holding company system to "a single integrated public-utility system", with the qualifications hereafter noted, and to "such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system", applies to "each registered holding company and each subsidiary company thereof". Passing, for the moment, the alleged significance of the adjective "registered", the definitions of the above-quoted terms, in Section 2 of the Act, show clearly that the classification of those subject to the requirement of divestment does not purport to be based upon participation in or effect upon interstate commerce.

The term "holding company" is defined (Section 2(a)(7)) as including (A) "any company which directly or indirectly owns, controls or holds with power to vote 10 per centum or more of the outstanding voting securities of a public-utility company * * *"; and (B) "any person which the Commission determines * * * directly or indirectly to exercise * * * such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties and liabilities imposed in this title upon holding companies".

Under Section 2(a)(5) a "public utility company" means either an "electric utility company" or a "gas utility

company" and the definition of those terms in Sections 2(a)(3) and 2(a)(4), respectively, import no test in any way related to interstate commerce. The definition of the term "subsidiary company" in Section 2(a)(8) is the counterpart of the definition of "holding company", above quoted, and is no more dependent upon engagement in or effect on interstate commerce.

Section 2(a)(7), (3), (4) and (8) contain provisions that the Commission, upon application, shall by order declare that a company is not a "holding company", "electric utility company", "gas utility company" or "subsidiary company", respectively, if certain specified conditions are met; but those conditions do not relate to engagement in or effect on interstate commerce. The only one which might give even a superficial appearance of attaching significance to such considerations is Clause (B) of Section 2(a)(3) which states as one of the requirements for such an order that "such company is one operating within a single State". But that is only one of several requirements, and a reading of the clause as a whole shows clearly that the fact that a company's operations are purely intrastate is not a sufficient ground for exclusion from the definition of "electric utility company".

Not only is the requirement of divestment unaffected by whether either the holding company or the corporations whose securities it holds do or do not bear any relation to interstate commerce, but the tests which guide the decision whether certain properties may or may not be retained thereunder are wholly unrelated to interstate-commerce factors.

Unless one or more of the qualifications of Section 11(b)(1) are satisfied, the holding company is to be limited

to a single "integrated public-utility system", a term that is defined in Section 2(a)(29) without any reference to interstate-commerce standards. By that provision "integrated public-utility system" means, as applied to "electric utility companies" (and the definition as applied to "gas utility companies" is so nearly the same as not to require separate quotation):

> "a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation;"

Under that definition several electric companies located in different states and physically interconnected, thus implying interstate commerce, would be retainable; whereas if they were not physically interconnected or capable of interconnection, they would not be retainable even if they were all located in a single state and no interstate commerce were involved.

The qualifications, above referred to, are expressed in Clauses (A), (B) and (C) which permit the continuance of control of one or more additional "integrated public-utility systems" if the Commission finds the facts required by all three. And those facts have no relation to interstate commerce or any effect thereon.

Clause (A) requires that such additional systems "cannot be operated * * * without the loss of substantial economies". As construed by the Commission and the court below (R., Vol. X, 4006) "substantial economies" means "important economies and not merely something more than nominal". Thus, even if retention of the additional system be more, rather than less, economical, it must still be disposed of if the economies are not "important". Clause (B) requires that "all such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country". Under this test obviously the question whether the additional system may be retained or must be disposed of depends not at all on whether its operations are interstate or intrastate. Clause (C) requires that the continued combination of such systems is "not so large * * * as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation". Here again the test has nothing to do with interstate commerce. Several disconnected public utility systems all located and operating wholly within a single state such as, for example, New York, Pennsylvania or Texas might fail to meet this requirement, whereas another system located in and operating between the states of, say, Maine, New Hampshire and Vermont would completely satisfy it.

Again, Section 11(b)(1) permits the retention of such "other businesses" as are "reasonably incidental, or economically necessary or appropriate to the operations" of the integrated public utility system which is retained. This test equally has no relation to interstate-commerce factors, as is made even clearer by the amplification that this means "necessary or appropriate in the public interest or for the

protection of investors or consumers and not detrimental to the proper functioning of such system or systems".

On the face of Section 11(b)(1) itself every company in which a holding company owned securities might be operating wholly intrastate and in such a manner as would have no effect upon interstate commerce, and still it would be required to divest itself of all of them, except those representing a "single integrated public-utility system", provided it held as much as 10% of the voting stock of any company which was a utility company. In the case of the petitioner itself, the order of the Commission permits it to retain as its single integrated public utility system the interstate system of the Union Electric Company of Missouri, but requires it to divest itself of those of the intrastate and state-regulated utility enterprises of the Cleveland Electric Illuminating Company, Pacific Gas and Electric Company and the Detroit Edison Company. Similarly, it is required to divest itself of North American Utilities Corporation which is the vehicle through which some surplus funds have been invested in some miscellaneous market securities, and the operation and investments of which in no way impinge upon interstate commerce. The Commission has reserved decision and so asserts the power to compel divestment of the stock of 60 Broadway Building Corporation, the owner of a New York office building.

(2) *The alleged significance of "registration."*

The Commission contended below that the definitions above referred to are without significance because Section 11(b)(1) applies only to "registered" holding companies, and that no holding companies are required to register ex-

cept those which are "interstate in nature". We submit that this argument is demonstrably incorrect. The requirements for registration are set forth in Section 4 of the Act. Section 5 simply prescribes the mechanics of such registration.

Section 4(a) makes it unlawful for a holding company, directly or indirectly, to do any one of six described things unless it registers under Section 5. These things are enumerated in paragraph (1) to (6). Of these (1) and (5) deal with activities in interstate commerce. But (2), (3) and (4) do not and paragraph (6) forbids the holding company "to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5) inclusive, * * *". Paragraphs (2), (3) and (4) respectively cover: (2) the entering into of any service, sales or construction contract; (3) making any public offering of any security of the holding company or any subsidiary or affiliate thereof; or (4) acquiring or negotiating for the acquisition of any security or utility assets of any subsidiary; if only these things are done "by use of the mails or any means or instrumentality of interstate commerce".

Bearing in mind the definition of "subsidiary company" in Section 2(a)(8), this means that a holding company was obliged to register if any single public utility company (though operating wholly intrastate) of which it owned as much as 10% of the voting stock, used the mails (even if for communication wholly within a single state where it was incorporated and did business) to make any service, sales or construction contract or to sell any security or acquire any utility asset; and this regardless of the character of the holding company's own operations or the character of any of the other corporations in which it held securities.

It is thus idle to contend that the obligation to register under Sections 4 and 5 has any tendency to show the necessary relation to interstate commerce. And this is made all the clearer by Section 4(b) which requires registration by "Every holding company which has outstanding any security any of which, by use of the mails or any means or instrumentality of interstate commerce, has been distributed or made the subject of a public offering subsequent to January 1, 1925, and any of which security is owned or held on October 1, 1935 * * * by persons not resident in the State in which such holding company is organized * * *".

Electric Bond & Share Company v. *Securities and Exchange Commission*, 303 U. S. 419, (which we discuss *infra* pp. 52-54) is a sufficient authority that the fact of registration is not enough to make the provisions of Section 11 constitutionally applicable. The defendants in that case were held to be obliged to register under Sections 4 and 5. But, as we point out hereafter, the opinion plainly implies that their right to contest the constitutionality of the other sections of the Act, and especially Section 11(b)(1), would not, because of that, be futile.

(3) *The "exemption" provisions of Section 3.*

The Circuit Court of Appeals relied on Section 3 as support for its conclusion that petitioner's activities and those of its subsidiaries brought it within the class of holding companies which might be subject to the commerce power. It said (R., Vol. X, 4008):

> "Section 3 provides administrative procedure by which a holding company can obtain exemption from any provision of the Act if it and its subsidiaries are predominantly intrastate in character."

and it pointed out that petitioner did not avail itself of this administrative remedy and does not assert that it is entitled to exemption.

We submit that the Circuit Court of Appeals was plainly in error in its reliance on Section 3.

That section in the part here material, provides:

> "SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, **unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers,* if—
>
> (1) such holding company, and every subsidiary company thereof which is a public-utility company from which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character *and* carry on their business substantially in a *single State in which such holding company and every such subsidiary company thereof are organized;*"

The remaining paragraphs of Section 3(a) are not here material. Paragraph (2) makes eligible for exemption a holding company which is "predominantly" a public utility company whose operations do not extend beyond the state in which it is organized *and* states contiguous thereto; paragraph (3) a company which is only "incidentally" a holding company and is principally engaged in other business, plus other requirements here of no importance; paragraph (4) a company which is only "temporarily" a hold-

---

*All italics in quotations in this brief are supplied unless otherwise noted.

ing company; and paragraph (5) one with only foreign public-utility subsidiaries.

Reverting to the material provisions of Section 3(a)(1), it is apparent that the test of exemption is not, as stated by the Circuit Court of Appeals, whether the holding company and its subsidiaries "are predominantly intrastate in character".

For a holding company even to qualify for consideration upon an application for exemption, not only must it and every one of its public utility subsidiaries be "predominantly intrastate in character", but also it and every such subsidiary must "carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized".

If petitioner, a New Jersey corporation, held nothing but a 10% voting stock interest in each of two public-utility companies, one located in Albany, New York, and one in Rochester, New York, each operating wholly intrastate, and having no effect on interstate commerce, it would not even be eligible to make application for exemption under Section 3(a)(1). Certainly the fact that petitioner was incorporated in New Jersey rather than New York would not make the system above supposed any the less "predominantly intrastate in character." North American's business office is in New York City. But suppose it were in Newark, New Jersey, instead. That would not make the system interstate in character. It may be that officials and employees would have to use interstate trains or interstate mails or telegraph or telephone lines to maintain contact with the operating subsidiaries. But so does any company whose main office, or any individual whose residence, is in another state from that in which some of its or his business operations are

conducted. No case has suggested that by so doing such a company, or such an individual, subjects all its or his activities to regulation, or its or his properties to divestment, at the hands of the federal government acting under the commerce power.

But suppose that, in the hypothetical case above described, the operating public utility subsidiaries all carried on their business and were incorporated in New Jersey, where petitioner also was organized. Petitioner would then be eligible to make an application for exemption under Section 3(a)(1). But the Commission would still be obliged to deny the exemption if it found that it would be "detrimental to the public interest or to the interest of investors or consumers", because that phrase qualifies the permitted exemption provided in all five of the paragraphs which follow. And this express test of whether the application for exemption should be granted or denied has nothing to do with participation by either the holding company or any of its subsidiaries in interstate commerce, or the presence or absence of any effect, substantial or otherwise, of any of the acts of any of them upon interstate commerce.

The Circuit Court of Appeals was therefore clearly in error in its view of the intendments of Section 3. As to the significance which the Court below attached to petitioner's failure to apply for exemption, it is enough to say that it was not eligible even to make such an application for the sufficient reason (which is not an interstate-commerce reason) that its subsidiaries were incorporated in states other than that in which it was organized (see Appendix A to Findings and Opinion of Commission, R., Vol. I, 179-183).

(c) The findings of the Commission show that its order is not grounded at all upon any relation of the prohibited property ownerships to interstate commerce, or upon any effect thereon.

We have hitherto pointed out that the Findings and Opinion of the Commission (R., Vol. I, 73-178) from beginning to end contain not a single reference to interstate commerce. But the light thrown by the Findings on the basis of the Commission's order of divestment goes beyond that fact. They show affirmatively that the considerations upon which that order was predicated have nothing whatever to do with interstate commerce or any effect upon it of petitioner's ownership of the securities of its subsidiaries, or, indeed, of anything done by petitioner or any of its subsidiaries.

The Findings and Opinion describe (R., Vol. I, 84-88) the system composed of petitioner and its subsidiaries, and the reasons (*id.* 88-93) for the Commission's choice of the system headed by Union Electric Company of Missouri as the "single integrated public-utility system" retainable by petitioner, none of which reasons relate to interstate commerce or any effect thereon. The Commission then discusses (*id.* pp. 93-110) whether, under the standards specified in Clauses (A), (B) and (C) of Section 11(b)(1), any of the other systems controlled by petitioner, which it found to be also "integrated public-utility systems", were retainable by petitioner as "additional" systems, and finds, for reasons germane to the requirements of those clauses but having nothing to do with interstate commerce, that none satisfied such requirements. It discusses (*id.* pp. 110-113) whether any of the gas systems may be retained

under the standards of Clauses (A) and (C) and concludes that it has not sufficient data to reach a decision on that subject. It discusses (*id.* pp. 113-131) whether any of the non-utility companies which were subsidiaries of petitioner, either directly or through the system of Union Electric Company of Missouri, may be retained under the "other businesses" proviso of Section 11(b)(1); and again the reasons which dictate permission or refusal of such retentions relate in no way to interstate commerce or any effect of such retention thereon.

The balance of the Findings and Opinion (*id.* pp. 131-170), up to the summary of conclusions and nature of the order (*id.* pp. 170-178), concern the application of the requirements of Section 11(b)(1) to petitioner's subsidiaries which are themselves registered holding companies, and are not here involved.

The Findings and Opinion simply find such facts and state such conclusions as were required, in the Commission's judgment, to apply the criteria of Section 11(b)(1) to petitioner and its subsidiary companies. Since the terms of that section did not make any relation on their part to interstate commerce a relevant factor, the Commission referred to no such consideration in carrying out those terms.

(d) The declarations by Congress in Section 1 of the Act do not constitute a legislative finding that petitioner's ownership of the securities of which the order requires divestment has any effect upon interstate commerce.

The Circuit Court of Appeals thought (R., Vol. X, 4008) that the necessity for findings by the Commission that petitioner's ownership of the securities, divestment of which is required by its Order, affected interstate commerce was

obviated by Section 1, which it said "expounds the policy underlying the necessity for control of holding companies as defined in Section 2(a)(7)",—in other words, that the Act was a valid exercise of power of the third category stated in the *Darby* case (*supra*, pp. 12-13).

We submit that this conclusion was erroneous. The full text of Section 1, which is headed "Necessity for Control of Holding Companies", is as follows:

> "SECTION 1. (a) Public-utility holding companies and their subsidiary companies are affected with a *national public interest* in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are *often* made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies *often* sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies *often materially affect the interstate commerce in which those companies engage;* (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.
>
> "(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-

second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the *national public interest*, the *interest of investors* in the securities of holding companies and their subsidiary companies and affiliates, and the *interest of consumers* of electric energy and natural and manufactured gas, are *or may be* adversely affected—

(1) *when* such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; *when* such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; *when* such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; *when* such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) *when* subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; *when* service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in

different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) *when* control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or *when* control of such companies is exerted through disproportionately small investment;

(4) *when* the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) *when* in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

"(c) *When* abuses of the character above enumerated *become* persistent and wide-spread the holding company *becomes* an agency which, *unless regulated*, is injurious *to investors, consumers, and the general public*; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to *meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce;* and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to

> the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

Interstate commerce is referred to only in subdivisions (a) and (c) and none of the references therein are anything like a finding or declaration of policy adequate to support the provisions of Section 11(b)(1).

Subdivision (a) says that public utility holding companies and their subsidiaries are affected with a "national public interest" for five reasons correspondingly numbered.

Reasons Nos. (1) and (2) have no materiality. Corporations do not become subject to regulation by Congress in all their activities and interests just because they market securities or make or perform contracts by means of the mails or instrumentalities of interstate commerce. That fact may perhaps make them subject to regulation with respect to security transactions, as Sections 6 and 7 of the present Act do, or make them subject to regulation with respect to their contracts so made or performed, as is provided in Section 13 of the present Act with respect to service, sales and construction contracts. But that has nothing to do with prohibition of their continued holding of securities or other property validly acquired under state law.

Reasons (3) and (5) may similarly be disregarded. The fact that (3) operating public utility companies "often" sell and transport gas and electric energy by use of means and instrumentalities of interstate commerce is irrelevant, because Section 11(b)(1) by its terms applies equally to holding companies none of whose subsidiaries do so. And as to reason (5), Section 11(b)(1) requires the divestment of securities, even though the activities of the holding com-

pany and its subsidiaries do not extend over many states and are entirely susceptible to effective state regulation.

The only reason, therefore, which has any semblance of relevance is (4) which states that the "practices" of holding companies in respect of and control over subsidiary companies "often" materially affect the interstate commerce in which those companies engage. Passing the consideration already adverted to that Section 11(b)(1) applies even though neither the holding company nor any subsidiary is engaged in interstate commerce, this declaration is, for several reasons, wholly insufficient as a finding to support an order under Section 11(b)(1).

Under the *Darby* case (*supra*, pp. 12-13) the function of the court is to determine whether "the particular activity" prohibited is within the reach of the federal power. The particular question here is of the power of Congress to prohibit petitioner's ownership of properties. The word "practices" is scarcely an apt way to describe such a condition. Section 1 purports to state the necessity of all the ensuing operative provisions of the Act. By far the major part thereof relate to regulation of future conduct. Security transactions are respectively regulated by Sections 6 and 7; acquisitions of interest in electric and gas utility companies by Section 8; acquisitions of securities and utility assets and other interests by Section 9; inter-company loans, dividends, security transactions, sale of utility assets, proxies and other transactions by Section 12; and service, sales and construction contracts by Section 13. The word "practices" in Section 1(a)(4) relates far more naturally to the matters corrected by the prospective regulatory provisions than it does to the status of property ownership.

Another fatal defect in this fourth reason, as support for the sweeping proscriptions of Section 11(b)(1), lies in the word "often". Its necessary implication is that the material effect on interstate commerce stated to result even from the "practices" does not exist in all, or even the generality of, cases. That would seem to require that some provision be made for a finding, either by a court in analogy to the Sherman Act or by an administrative agency, whether that reason applies to the particular holding company against which a divestment order is contemplated. But, as we have already pointed out, the Act makes no such provision.

This defect is accentuated by the single reference to interstate commerce in subdivision (c). It is there declared to be the policy of the Act to meet the problems and eliminate the evils connected with "public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce". That amounts to saying that it is not the policy of the Act to meet the problems and eliminate the evils connected with holding companies which are not engaged in interstate commerce or in activities which directly affect or burden interstate commerce. The "which" in subdivision (c) corresponds to the "often" in subdivision (a). It does not support the concluding clause of (c) stating a policy to compel the simplification of public utility holding systems generally, the elimination therefrom of properties detrimental to the proper functioning thereof and "to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title". Still less does it support the terms of Section 11(b)(1), requiring indiscriminately

the divestment of properties by a public utility holding company whether or not "engaged in interstate commerce or in activities which directly affect or burden interstate commerce".

There is no justification for attempting to enlarge by construction the limited scope of the legislative finding in Section 1. That the phraseology above quoted was not inadvertent clearly appears from the legislative history. The legislation was initiated by substantially identical bills simultaneously introduced in the Senate by Senator Wheeler (S. 1725, 74th Congress, First Session) and in the House by Congressman Rayburn (H.R. 5423, 74th Congress, First Session) on February 6, 1935. Section 1(a)(4) of H.R. 5423 made an unqualified finding as follows (with which Section 2(a)(4) of S. 1725 is substantially identical):

> "Section 1. (a). Public utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things,* * *
>
> 4. Their practices and control over subsidiary companies materially affect the interstate commerce in which those companies engage".

Thereafter these bills were referred to committees and after several months of hearings and investigations the Senate passed a bill (S. 2796, 74th Congress, First Session) on June 11, 1935 which, with amendments, was passed by the House on July 2, 1935. This bill then went to conference and was enacted on August 22, 1935 in the form reported by the Conference Committee.

Section 1(a)(4) in S. 2796 as passed by the Senate and the House on June 11 and July 2, 1935 respectively

was in the same form as it now appears in the bill as enacted. The introduction of the word "often" therefore followed the months of consideration by Congress in which the facts relating to the industry were given prolonged consideration. It is manifest that Congress changed the unqualified language of the bills as introduced to the present wording deliberately because it found that the latter was the strongest statement that would square with the facts.

A legislative finding that an effect on interstate commerce sufficient to justify prohibitory legislation exists in some cases cannot support a legislative prohibition which applies in all cases. True, subdivision (b) enumerates in five paragraphs certain classes of conditions, which are referred to in (c) as "abuses" or "evils", but the word "when", with which these paragraphs are introduced, clearly implies that such conditions are not general. And, more importantly, there is no statement therein that interstate commerce is affected by these conditions even "when" they occur; rather the statement is that the interest of "investors" and "consumers" are "or may be" adversely affected. As well might Congress say that because corporations generally, or individuals, "often" engage in interstate commerce or in unspecified activities which directly affect or burden interstate commerce, and that some of them have been guilty of abuses in certain described phases of their operations, all corporations and individuals may be prohibited from owning property of certain kinds or in certain locations, without any finding that by such ownership interstate commerce is affected substantially or at all.

(e) The decisions of this Court upholding regulation of conduct which was not commerce or was in intrastate commerce themselves show the absence of foundation for the legislation embodied in Section 11(b)(1).

The power conferred on Congress by Article I, section 8, clause 3 of the Constitution is to regulate "commerce", meaning "traffic" or "intercourse", among the several states; and "regulate" means "to prescribe the rule by which commerce is to be governed". *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 196. Where Congress prescribes such a rule for interstate commerce, it has plenary incidental power to make that rule effective by regulating or prohibiting things which would otherwise substantially interfere with its operation. But it is still interstate commerce which is the subject of the permitted regulation.

It follows that the necessary foundations for control by Congress of conduct which is not commerce or is intrastate commerce are (1) the prescribing of a rule for interstate commerce, and (2) a finding that the conduct sought to be reached has such an effect on interstate commerce that without its control the rule would be ineffective. It is not enough to support laws of this class that the person whose non-interstate-commerce conduct is sought to be reached is in other matters engaged in interstate commerce.

> "* * * It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120.

See also *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 32, 38; *United States* v. *Darby*, 312 U. S. 100, 121.

The enactments of this class which this Court has upheld have recognized the necessity for the two foundations which we have above stated, and the decisions of this Court upholding them clearly indicate that in their absence power under the commerce clause does not exist. We have already shown the absence of such foundations for Section 11(b)(1).

Our discussion of the cases may conveniently commence with *United States* v. *Darby, supra.* That case involved the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060) prohibiting the shipment in interstate commerce of commodities manufactured by employees whose wages were less than the prescribed minimum or whose weekly hours of labor were greater than the prescribed maximum; and prohibiting the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. The latter provision was sustained as a regulation of intrastate activities which had a substantial effect upon interstate commerce itself. The unqualified congressional finding in that statute is in marked contrast to the vague and equivocal declaration in the Act here in question. Section 2(a) of the Fair Labor Standards Act declared:

> "The Congress hereby finds that the existence, in industries engaged in commerce [defined in Section 3(b) to cover interstate and foreign commerce] or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers

> of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

To support its conclusion that the evil inherent in substandard labor conditions "so burdens" and "obstructs" interstate commerce as to be within the reach of federal power, this Court relied particularly (312 U. S., p. 119) upon its prior decisions upholding the National Labor Relations Act of 1935 (49 Stat. 449). *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38, 40; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 466; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 604.

In the *Jones & Laughlin* case, this Court (301 U. S., p. 29) took note of the argument of the respondent that the National Labor Relations Act involved "an attempt to regulate all industry", that the references in the statute to interstate and foreign commerce were colorable at best, and that the statute was not "a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation". This Court, after saying (pp. 29-30) that if this conception of terms, intent and consequent inseparability were sound the Act would necessarily fall, continued (p. 30):

> "But we are not at liberty to deny effect to specific provisions, which Congress has constitu-

> tional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. [Citing cases.]
>
> "We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority."

The Court then referred (pp. 30-31) to the jurisdiction of the Board, as conferred by Section 10(a), to prevent any person from engaging in any unfair labor practice "affecting commerce"; to the statutory definition of "commerce" as meaning interstate and foreign commerce; and to the following statutory definition of the term "affecting commerce":

> " 'The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.' "

The Court then said:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign com-

> merce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." (p. 31)
>
> * * *
>
> "* * * Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise." (p. 32)

There was in that case an exceedingly comprehensive and unequivocal legislative finding of substantial effect on interstate commerce and declaration of policy to prevent it contained in Section 1, quoted in a footnote to the Court's opinion (301 U. S., p. 23). Nonetheless, this Court, in the sentence immediately following the last-quoted passage, said:

> "We are thus to inquire whether in the instant case the constitutional boundary has been passed."

After an exposition of the fundamental principles underlying the constitutional question, this Court went on (pp. 41-43) to find for itself that the effect upon interstate commerce of the "industrial strife" which the statute was aimed to prevent was by no means "indirect or remote" but would be "immediate" and might be "catastrophic".

In *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, at page 466 (the page particularly referred to in this Court's citation of the case in *United States* v. *Darby*), this Court said:

> "*Third.* It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains."

For the proposition stated in the last sentence of the quotation from *United States* v. *Darby*, (*supra*, pp. 12-13) this Court cited two cases: *United States* v. *Ferger*, 250 U. S. 199, and *Virginian Ry. Co.* v. *Federation*, 300 U. S. 515, 553. The *Ferger* case involved a statute making criminal the uttering of spurious bills of lading purporting to be used in interstate commerce. This Court resorted (p. 204) to common knowledge, of which it might take judicial notice, that bills of lading for the movement of interstate commerce are instrumentalities of that commerce. The *Virginian Railway* case involved the constitutionality of the Railway Labor Act, requiring a carrier to "treat with" those certified by the Mediation Board as representatives of a craft or class, as applied to certain "back shop" employees who, it was asserted, were solely in intrastate commerce. But this Court (p. 556) referred to the findings of the courts below that "interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation". On the question of constitutionality

it said (p. 553, the page particularly referred to in this Court's opinion in the *Darby* case) that the judgment of Congress "supported as it is by *our* long experience with industrial disputes, and the history of railroad labor relations, to which we have referred, is not open to review here". Beginning at the bottom of that page is a long footnote summarizing the history of railway labor relations, to which the Court referred.

This Court's opinion in the *Virginian Railway* case also points to another distinction which is significant in the instant case. Referring to the *Employers' Liability Cases*, 207 U. S. 463, the Court said (p. 557):

> "* * * Whatever else may be said of that pronouncement, it is obvious that the commerce power is as much dependent upon the *type of regulation* as its subject matter. It is enough for present purposes that experience has shown that the failure to settle, by peaceful means, the grievances of railroad employees with respect to rates of pay, rules or working conditions, is far more likely to hinder interstate commerce than the failure to compensate workers who have suffered injury in the course of their employment."

In all of these cases there was clear factual basis for the view that regulation of the "particular" intrastate matter involved was necessary to make effective a rule established by Congress for interstate transactions.

The same was true with respect to the Agricultural Marketing Act of 1937 (50 Stat. 246) the enforcement of which was upheld in different aspects by this Court in *United States* v. *Rock Royal Co-Operative Inc.*, 307 U. S. 533 and *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110 (*supra*). That statute provided that

the Secretary of Agriculture should regulate agricultural commodities or products

> "in the current of interstate or foreign commerce, or which directly burdens, obstructs or affects" that commerce.

We have already shown that the provisions of Section 11(b)(1) of the Act here in question are not susceptible of a construction which would so limit them. In the *Rock Royal Co-Operative* case this Court said as to the question of local milk (307 U. S. p. 569):

> "Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of Congress extends also to the local sales."

In the *Wrightwood Dairy Company* case, *supra*, the local milk of the respondent was sold in Illinois in competition with the interstate milk, and it was found that 60% of the milk sold in the marketing area was produced in Illinois and 40% in neighboring states. The factual basis for the regulation with respect to intrastate milk was that "by reason of its competition with the handling of the interstate milk" it "so affects that commerce as substantially to interfere with its regulation by Congress (315 U. S. pp. 125-126).

This Court's most recent decision on the subject (*Wickard v. Filburn*, 87 L. Ed. 57), upon which the Circuit Court of Appeals particularly relied (R., Vol. X, 4009), is simply another application of the same doctrine. The Agri-

cultural Adjustment Act of 1938 (52 Stat. 31), and the amendment thereof of May 26, 1941 (55 Stat. 203) there involved, was of a wholly different character from the Public Utility Holding Company Act here in question. Its purpose, as declared in its title, was to provide for the conservation of national soil resources "and to provide an adequate and balanced flow of agricultural commodities in interstate and foreign commerce". The policy which it declared and the provisions enacted to carry it out were directly concerned with the fostering of interstate commerce in vital agricultural commodities. In the language of the declaration of policy to the entire Act (Section 2, 52 Stat. p. 31) it was

> "to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices."

Title III of the Act dealt particularly with the means above enumerated, particularly marketing quotas, with respect to several enumerated commodities. The legislative findings regarding wheat appear in Section 331, which reads as follows (52 Stat. pp. 52-53):

> "Sec. 331. Wheat is a basic source of food for the Nation, is produced throughout the United States by more than a million farmers, is sold on the country-wide market and, as wheat or flour, flows almost

entirely through instrumentalities of interstate and foreign commerce from producers to consumers.

Abnormally excessive and abnormally deficient supplies of wheat on the country-wide market acutely and directly affect, burden, and obstruct interstate and foreign commerce. Abnormally excessive supplies overtax the facilities of interstate and foreign transportation, congest terminal markets and milling centers in the flow of wheat from producers to consumers, depress the price of wheat in interstate and foreign commerce, and otherwise disrupt the orderly marketing of such commodity in such commerce. Abnormally deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce with consequent injurious effects to the instrumentalities of such commerce and with excessive increases in the prices of wheat and its products in interstate and foreign commerce.

It is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be protected from such burdensome surpluses and distressing shortages, and that a supply of wheat be maintained which is adequate to meet domestic consumption and export requirements in years of drought, flood, and other adverse conditions as well as in years of plenty, and that the soil resources of the Nation be not wasted in the production of such burdensome surpluses. Such surpluses result in disastrously low prices of wheat and other grains to wheat producers, destroy the purchasing power of grain producers for industrial products, and reduce the value of the agricultural assets supporting the national credit structure. Such shortages of wheat result in unreasonably high prices of flour and bread to consumers and loss of market outlets by wheat producers.

> The conditions affecting the production and marketing of wheat are such that, without Federal assistance, farmers, individually or in cooperation, cannot effectively prevent the recurrence of such surpluses and shortages and the burdens on interstate and foreign commerce resulting therefrom, maintain normal supplies of wheat, or provide for the orderly marketing thereof in interstate and foreign commerce.
>
> The provisions of this Part affording a cooperative plan to wheat producers are necessary in order to minimize recurring surpluses and shortages of wheat in interstate and foreign commerce, to provide for the maintenance of adequate reserve supplies thereof, and to provide for an adequate flow of wheat and its products in interstate and foreign commerce. The provisions hereof for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions."

The operative provisions regarding marketing quotas are in Sections 335 to 339 (52 Stat. 54-55).

This Court thus had solid foundation for stating (87 L. Ed. p. 59):

> "The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce."

The amendment of May 26, 1941 increased the penalty for the farm marketing excess and subjected the entire crop to a lien for the payment thereof.

The question before this Court therefore was simply whether, in view of the use to which Filburn put his wheat, his surplus could be said to affect interstate commerce and the declared policy of Congress with respect to it sufficiently to make the application of the statute to him constitutional. As to that this Court said (87 L. Ed. p. 66):

> "The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop."

There was in the record a stipulation of the economic facts on the basis of which this Court itself found that the raising of wheat for Filburn's own consumption did affect the marketing of wheat in interstate commerce. It said (p. 67):

> "This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."

In contrast, Section 11(b)(1) of the Public Utility Holding Company Act of 1935 does not purport to be a regulation of interstate commerce; there is no congressional declaration that its provisions were necessary to carry out any policy with respect to interstate commerce; the impact of that section has nothing to do with interstate commerce or any effect thereon; there is no finding, judicial, administrative, or legislative, that the ownership by petitioner of the securities of which the orders here under review require divestment affected interstate commerce substantially or at all; and there is nothing in this record, by stipulation or otherwise, upon which this Court can make such a finding.

The differences between the Act here under review and the recent enactments which this Court has upheld under the commerce power are further illustrated by the case of *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, holding the Bituminous Coal Act of 1937 (50 Stat. 72) constitutional. This was entitled "An Act to regulate interstate commerce in bituminous coal, and for other purposes". Its opening language was a congressional declaration

> "That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

Section 4 sets forth the Bituminous Coal Code and the third paragraph of that section, which introduces the detailed provisions regarding the code, declares as follows:

> "For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal *and which shall be applicable only to matters and transactions in or directly affecting interstate commerce* in bituminous coal:"

This Court, in upholding the regulatory provisions of the statute, said (p. 393):

> "These provisions are applicable only to sales or transactions in, or directly or intimately affecting, interstate commerce."

In the court below the Commission attempted to analogize the provisions of Section 11(b)(1) requiring divestment of properties with the Sherman Act, the Clayton Act and the commodities clause of the Hepburn Act. The analogy wholly fails. Those statutes prescribe rules for the conduct of interstate commerce. No divestment of property is provided for. When it occurs it is as incident to the enforcement of the rule, and because of a judicial finding that the policy of Congress with respect to interstate commerce requires it. The decisions under those acts make clear that divestment of properties cannot be justified under the commerce clause simply because the corporate owners thereof are engaged in interstate commerce.

That was made plain in the Sherman Act case most strongly relied on by the Commission below, *Northern Securities Company* v. *United States*, 193 U. S. 197. There it was held that the acquisition by the Northern Securities Company, after the passage of the Sherman Act, of the capital stocks of two competing interstate carriers, Great Northern and Northern Pacific, was in violation of that Act, and the Northern Securities Company was ordered to divest itself thereof. The basis for the decision was that the acquisition of these stocks by the holding company violated the rule embodied in the Sherman Act that competition in interstate commerce could not be restrained by any device whatever. If the Northern Pacific and Great Northern had not been in competition, the ownership of their stocks by the Securities Company would have

offended no rule for interstate commerce and a requirement of divestment would have been without constitutional foundation. The opinions of the majority and the minority in that case bring this out clearly.

The minority view was that the Sherman Act, if construed so as to prevent the Northern Securities Company from acquiring the stocks of competing railroads, was a regulation by Congress of ownership, and that Congress did not have this power under the Constitution. The majority view was that Congress had not undertaken to regulate ownership, but had laid down a rule for the conduct of interstate commerce, and that acquisition of securities in conflict with that rule could be, and was, made illegal.

Mr. Justice White, writing for the dissenting Justices, said (p. 369):

> "Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. 'Commerce undoubtedly is traffic, but it is something more, it is intercourse;' that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them."

Mr. Justice Harlan, for the majority, said (p. 334):

> "* * * It [the Government] does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation

engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited by the Constitution.

(p. 337) "The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as a *rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition." (Italics in original.)

The case lays down no rule that Congress may compel divestment of the ownership of stock, even in the case of corporations engaged in interstate commerce, whenever it deems such ownership to be against the general welfare. It lays down only the principle that where a corporation purchases stock with the purpose and effect of restraining competition in interstate commerce, the Court can compel the divestment of the stock in order to eliminate the restraint on interstate commerce. The *reductio ad absurdum* of the view that Congress can regulate anything which might affect commerce in any degree was given by Mr. Justice Holmes (p. 402):

"* * * Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce."

The cases that have arisen under Section 7 of the Clayton Act, prohibiting restraints on competition in interstate

commerce by the acquisition of stock of competing companies, add nothing. Moreover, Section 7 is not retroactive, but expressly provides:

> "Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired."

The cases under the commodities clause of the Hepburn Act show clearly that the regulation was of interstate commerce. It concerned only coal transported in interstate commerce, and the purpose of Congress was to prevent railroads from occupying the dual position of carrier and shipper as to coal transported in interstate commerce. In the first case that arose under that Act (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366) the Government contended that Congress had the power to prohibit an interstate railroad from engaging in the business of mining coal. Because of the grave constitutional questions which the Court held were presented by that contention (see pp. 406-408), this Court construed the Act as merely preventing the carrier from transporting coal which it owned when transported. The Court further held that the Act did not prevent a railroad corporation from owning the stock of the mining company (p. 413). In *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, it was held that the right of a carrier to own such stock did not apply where the carrier controlled the mining company to such an extent as to destroy its separate entity. In *United States* v. *Delaware, L. & W. R. R. Co.*, 238 U. S. 516, where the Court held the mining company to be the mere agent of the carrier, it reaffirmed its decision that ownership of stock therein was not in itself enough to make the transportation illegal.

There is nothing in the case of *Electric Boud & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419 (the only decision of this Court in which the constitutionality of any provision of the Public Utility Holding Company Act has been considered), which in any way affects these conclusions. It decided nothing except that the defendants in that case could constitutionally be required to register under Sections 4 and 5 of the Act; and the implications from that decision, so far from aiding the contentions of the Commission here, are opposed to them. The question of the validity of any provision of the Act except Sections 4 and 5 was expressly excluded. The chief issue arose on defendants' contention that those sections were merely auxiliary to the "control" provisions (Sections 6-13) and so interwoven with them that they could not properly be treated as a separate enactment, to be enforced regardless of the constitutionality of the rest of the Act (pp. 433-435, 437). This Court would not have had to decide that difficult question of construction if it had entertained any idea that the relation of the defendants' activities to interstate commerce were enough as to make the control provisions constitutional as against them anyhow. To the contrary, the Court emphasized again and again the reservation of the defendants' constitutional and legal rights as to all the other sections of the Act, and it said (p. 435) that this reservation was not "illusory". It quoted with express approval (p. 436) the statement of the District Court that

> "* * * § 1 (c) in its entirety negatives any conclusion that the simplification and elimination of holding companies 'is the sole policy or the whole end and object of the Act, which, as stated, is "to

> meet the problems and eliminate the evils, as enumerated in this section, connected with public utility holding companies,"' and thus 'simplification and elimination' are but a means and not 'the exclusive means' deemed to be essential for the purpose of effectuating such policy in whole *or insofar as may be constitutionally possible.'"

This was particularly true of Section 11. The Court (p. 436) thus described the Government's contention:

> "* * *'If, for example,' argues the Government, 'section 11 dealing with corporate reorganizations were adjudged invalid, there is no inherent reason why the other regulatory provisions could not be enforced as the Congress provided.'"

The Court's conclusion was (p. 441) that "Without attempting to state the limits of permissible regulation in the execution of" the declared policy of Congress with respect to public utility holding companies, it had no reason to doubt "that from these defendants, with their highly important relation to interstate commerce and the national economy, Congress was entitled to demand the fullest information as to organization, financial structure and all the activities which could have any bearing upon the exercise of congressional authority". It is manifest from the opinion that, when the Supreme Court said that the defendants in that case* were "engaged in activities within the reach of Con-

---

*It should be noted that the activities of the defendants in the *Electric Bond & Share* case, which this Court emphasizes as related to interstate commerce, are not parallelled in the case of North American. Thus the Court (303 U. S., pp. 431-440) referred to "an elaborate stipulation" in the record and to the "findings of fact" of the trial court on that subject. But in the

gressional power" (303 U. S., p. 433), it meant that they were subject to the exercise of that power which was embodied in Sections 4 and 5.

Congress can, of course, require the *furnishing of information* from one whose activities only remotely touch upon interstate commerce. Indeed, it can require *information* to be furnished for the purpose of determining its jurisdiction. See, *e.g., Newport Shipbuilding & Dry Dock Co.* v. *Schauffler,* 303 U. S. 54, 58.

If the vague, general and equivocal references to interstate commerce in Section 1 of the Public Utility Holding Company Act were held sufficient to justify the sweeping requirements for compulsory divestiture of property which are contained in Section 11(b)(1) as a proper exercise of the commerce power, it is impossible to fix limits to its scope. Congress would equally be authorized to fix the number of factories that an industrial concern might be permitted to have, or the number of branch stores that a mercantile establishment might maintain, the locations thereof, the per-

---

instant case there are no such stipulation and no such findings by any court or by the Commission. For example, the defendants in the *Electric Bond & Share* case were performing, either directly or through a wholly-controlled subsidiary, several contracts for the rendering of continuous expert specialized and technical service, advice and assistance to the subsidiary companies upon every phase of the utility enterprise (303 U. S., pp. 432-433). But North American, in its entire history, has never had a service company providing management, construction or other services for compensation (R., Vol. VIII, 2903) and the Commission found (R., Vol. I, 100-101) that "as nearly as can be determined from the record in this case, North American leaves operations and operational policy to the managements of its subsidiaries."

mitted number, character and residence of their personnel, etc. A conception of federal power as including control of the ownership of property to promote the general welfare, and regardless of the existence or absence of an effect on interstate commerce, would read out of the Constitution the limitation that congressional action under Article I, section 8, clause 3 must be in regulation of interstate commerce.

SECOND: SECTION 11(b)(1) OF THE ACT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Circuit Court of Appeals (R., Vol. X, 4009-4010) held that "the guaranty of due process demands only that the law shall not be 'unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained' ", citing *Nebbia* v. *New York*, 291 U. S. 502, 525.

"Whatever terminology is used, the criterion is necessarily one of degree" since "mathematical or rigid formulas * * * are not provided by the great concepts of the Constitution such as 'interstate commerce', 'due process', and 'equal protection' ", *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467. There is no doubt of the general rule that the Fifth Amendment limits congressional action in connection with the commerce power. *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 324-325, 336. The only question is as to what kinds of interference with property rights may be sustained as consistent with its terms.

It is certainly not enough that the means selected by Congress has a real and substantial relation to the object

sought to be attained. That might be a sufficient answer to an attack under the Fifth Amendment of the regulatory provisions of the Act where any injuries to property rights might be deemed merely consequential. But it is not in itself an answer to an enactment like Section 11(b)(1) which operates retroactively to cause actual deprivations without provision for compensation of property rights lawfully acquired and held. For example, acquisition of a desirable site for a post office would certainly be an appropriate means of carrying out the power of Congress "To establish Post Offices and post Roads", and the acquisition of a right-of-way for an interstate railroad or power transmission line would equally be an appropriate exercise of the commerce power. But no one would contend that either could be done without compensating the owner of the property thus acquired. The Circuit Court of Appeals said (R., Vol. X, 4010) that "Compelling the holding company to dispose of its securities is not the same as condemning private property for public use without paying just compensation". But the injunction of the Fifth Amendment against deprivations of property without due process of law is by no means confined to condemnations.

In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, this Court held the first Frazier-Lemke Act unconstitutional as against a mortgagee suing to foreclose a farm mortgage made some ten years before the passage of the Act. The Court found (p. 594) that the Act had taken from the mortgagee definite property rights, which were recognized by the law of Kentucky. To the argument that the Act was an appropriate exercise of the bankruptcy power, the Court replied that exercise of that

sort was barred by the Fifth Amendment. Mr. Justice Brandeis, writing for a unanimous Court, said:

> "Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.
>
> "*Fourth.* The bankruptcy power, *like the other great substantive powers of Congress,* is subject to the Fifth Amendment." (p. 589).

Both the purpose and effect of the Frazier-Lemke Act there involved had considerable similarity to those of Section 11(b)(1) of the Act here in question. They are thus summarized in the following passage in this Court's opinion (pp. 598-599):

> "*Seventh.* Radford contends further that the changes in the mortgagee's rights in the property, even if substantial, are not arbitrary and unreasonable, because they were made for a permissible public purpose. That claim appears to rest primarily upon the following propositions: (1) The welfare of the Nation demands that our farms be individually owned by those who operate them. (2) To permit widespread foreclosure of farm mortgages would result in transferring ownership, in large measure, to great corporations; would transform farmer-owners into tenants or farm laborers; and would tend to create a peasant class. (3) There was grave danger at the time of the passage of the Act, that foreclosure of farms would become widespread. The persistent decline in the prices of agricultural products, as compared with the prices of

articles which farmers are obliged to purchase, had been accentuated by the long continued depression and had made it impossible for farmers to pay the charges accruing under existing mortgages. (4) Thus had arisen an emergency requiring congressional action. To avert the threatened calamity *the Act presented an appropriate remedy.* Extensive economic data, of which in large part we may take judicial notice, were submitted in support of these propositions."

This Court answered that argument as follows (pp. 601-602):

"We have no occasion to consider either the causes or the extent of farm tenancy; or whether its progressive increase would be arrested by the provisions of the Act. Nor need we consider the occupations of the beneficiaries of the legislation. These are matters for the consideration of Congress; and the extensive provision for the refinancing of farm mortgages which Congress has already made, *shows that the gravity of the situation has been appreciated.* The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value [citing cases]. As we conclude that the Act as applied has done so, we must hold it void. *For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation.* If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that,

through taxation, the burden of the relief afforded in the public interest may be borne by the public".

In the same vein are the expressions of this Court, by Mr. Justice Holmes, in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, which reversed under the Fourteenth Amendment a state decision upholding as "a legitimate exercise of the police power", a statute forbidding the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation, with certain exceptions:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. * * * [p. 413].
>
> "* * * What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. * * * [p. 414].
>
> "* * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." [p. 416].

In *Block* v. *Hirsh,* 256 U. S. 135 this Court upheld, against attack under the Fifth Amendment, an emergency rent law for the District of Columbia protecting from evic-

tion tenants whose leases expired while the Act was in force so long as they paid reasonable rent, but solely on the ground of its being a temporary measure necessitated by emergency conditions growing out of the War. Mr. Justice Holmes, writing for the majority of this Court, recognized that "regulations of the present sort pressed to a certain height might amount to a taking without due process of law" (p. 156), and concluded: "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change".

In *Wickard* v. *Filburn*, 87 L. Ed. 57, (*supra*) the grounds upon which this Court upheld the legislation there involved against attack under the Fifth Amendment were that its apparently retroactive features were not actually such because "the penalty was contingent upon an act which appellee committed not before but after the enactment of the statute", and that the statute, along with the detriments complained of, conferred large benefits upon the appellee. This Court concluded (p. 69):

> "* * * That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows. To deny him this is not to deny him due process of law."

Neither of these grounds applies to Section 11(b)(1). Its operation is manifestly retroactive and neither that section nor the Act as a whole confers upon petitioner any benefit to compensate for the deprivation of property which its enforcement would entail.

That deprivation of property is no mere technical one, but will inevitably involve a vast destruction of values.

First and paramount is the destruction of the right of the shareholders to pool their investments and thereby obtain for them the benefit of efficient, common management of diversified interests. That right is one conferred by the State of New Jersey which has authorized persons to form corporations in order to acquire and hold stocks of other companies. The North American Company represents one of the early exercises of that right. It was organized in 1890 and its 53 years of history shows how valuable that right has been. The North American Company has steadily grown and prospered and it has done so through being a prudent and wise investor. The record of this case is replete with evidence showing the beneficent influence of The North American Company management upon the properties in which it has largely invested. That management has promoted efficient local managements. It has provided them with the financial resources for sound development and has promoted operating efficiency through encouraging the operating companies to exchange the benefits of their experience.

This is a case where the whole is greater than the sum of the separate parts. Two values are inherent in the whole which are destroyed when it is broken up into its separate parts—the value of further assurance of competent operating management and of sound financing of properties, and the value of diversity of investment, the existence of which is dependent on the continuance of the holding company in relationship to the operating utility companies.

The functions of the holding company, in the case of North American, are to provide a diversity of investment in sound, metropolitan operating utilities located in different parts of the country, where local economic and business

conditions affecting earning power from year to year vary and where local rainfall conditions affecting the production of hydro-electric power vary; and to provide a supervisory investor management responsible to the stockholders for seeing that competent operating managements are maintained in charge of the operations of the utility properties, and that the subsidiary companies and local properties are soundly financed and have available the necessary capital and the best of technical facilities in order to meet the growing needs for electric power of the communities which they serve.

To break up The North American Company by requiring it to divest itself of all its assets except one property is to destroy very real and important elements of value, regardless of whether the break-up can be effected by distribution of assets, as against enforced liquidation of assets.

It is true that large investors can obtain diversity of location of the utility properties in which they invest by buying a number of parcels of independent operating utility stocks instead of one parcel of holding company stock. However, the small investor has no such choice, as a practical matter, and must give up this factor of diversity if his holding company is eliminated or restricted to ownership of one property. The overwhelming majority of petitioner's common stockholders hold 100 shares or less. On the other hand, large investors, as well as small investors, cannot obtain the benefits of the supervisory investor management which are real and important factors of value in the stock which they have bought and paid for unless there be the continuance of the holding company.

This deprivation of property is not avoided by talking about "abuses" or "evils". Moreover, in the case of The

North American Company citation of no such abuses or evils is to be found in the reports of the Federal Trade Commission or of the Committee on Interstate and Foreign Commerce (House of Representatives) referred to in Section 1(b) of the Act as disclosing facts on the basis of which the recitation of "abuses" and "evils" in Section 1(b) is predicated. Neither is finding of such abuses or evils in the case of The North American Company to be found in the Findings and Opinion of the Commission (R., Vol. I, 73-178). The Act makes no provision for such findings. We submit that, if compulsory divestment of property is to be regarded as a means of eliminating "abuses", due process demands that the statute which compels this should equally provide for a fair hearing on the question of whether the person affected has in fact been guilty of the abuses sought to be remedied.

Nor is this deprivation of property avoided by referring to the extension of time, "plan of reorganization" and receivership provisions of Section 11 (c), (d) and (e) of the Act, because extensions of time of voluntary compliance for an additional year, plans of reorganization, whether voluntary or involuntary, and whether or not adjudged fair and equitable, and receiverships and trusteeships, all lead eventually and inevitably to one goal—the break-up of the holding company and the divestment of all its assets except one property. That break-up, that divestment, of itself constitutes a very real destruction of values and deprivation of property, regardless of the technical steps and methods employed in carrying it out.

In addition to this right of which the Commission's order would deprive the stockholders of the Company, the

order involves a further destruction of values in its requirement that the petitioner divest itself of investments having an approximate cost to it of $190,000,000. (See Appendix A).

There are only two methods by which the divestment order may be carried out. One is by a distribution of assets in kind; the other by a liquidation of such assets.

A distribution in kind would be impossible unless the presently outstanding debentures and preferred stock of petitioner are first paid off at their liquidation or redemption prices, aggregating over $100,000,000. This prior right of the holders of debentures and preferred stock is, contractually, a right to dollars and petitioner is amply solvent. Thus, cash must be realized in that amount, or underlying stocks must be exchanged for petitioner's debentures and preferred stocks on a basis which satisfies their holders that they are getting, on the basis of market values, the equivalent of cash. Only after that can there be any distribution of assets in kind to petitioner's common stockholders. The only practicable method, therefore, of complying with the divestment order is by a very large liquidation of securities. This is, of course, exactly the method of divestment which will produce the most disastrous consequences.

Any enforced, large-scale liquidation at any time means substantial sacrifice. As this Court said in *Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 299, "the forced sale of several hundred millions of stock would have manifestly involved disastrous results." If the enforced liquidation were effected on a high market there would still be large losses in relation to what would have been realized out of transactions between free sellers and willing buyers.

The liquidation is at valuations fixed by buyers who know that the sellers are under compulsion to sell; it is not at valuations arrived at between free sellers and willing buyers. The point is not whether at the moment the stock market is "high" or "low", but it is that Section 11(b)(1) creates a situation where there must be liquidation under circumstances which inherently prevent a realization of fair values of the underlying assets, even after the loss on break-up of the holding company is accepted. No extensions of time or waiting for a favorable turn in the cycle of markets, no substitution of statutory receivers or trustees for the lawfully constituted management of the Company, elected by the stockholders, no plan of reorganization, however clever and intricate, can avoid these losses to stockholders attendant on enforced liquidation which are inherent in the application of Section 11(b)(1) to a thoroughly solvent holding company with senior securities outstanding in excess of $100,000,000.

A fortiori, an enforced, large-scale liquidation in the course of the present total war, with its consequent depressed market conditions and the disappearance of security purchasing demands and power, means the maximum in sacrifice. When the British owners of Viscose Company were, in 1941, forced to sell their stock in the American market to produce dollar exchange as a war requirement of their government, the British government recognized that the liquidation involved, in effect, a confiscation of 50% of the real value and it indemnified the owners to that extent (*N. Y. Times*, July 23, 1942).

Inevitably, the risks and the losses of forced liquidations must be borne by petitioner's common stockholders. There

are about 58,000 holders of petitioner's common stock of whom 85% hold 100 shares or less. They reside in every state of the United States, and include insurance companies, trustees, guardians, executors, and educational and religious institutions. More than 460,000 shares of common stock are held by banking institutions as trustees for about 1,300 trust accounts. (R., Vol. VIII, 2873-5). It is these people who will ultimately feel the consequences of the Commission's order. The Commission's order will result in a true and real deprivation of property lawfully acquired and held for many years.

The Circuit Court of Appeals said (R., Vol. X, 4010):

> "If, as petitioner contends, such distribution will be impossible and a liquidation by sale becomes necessary, *the process may be painful to its common stockholders*, but we cannot say that the *remedy selected* by Congress is so unreasonable, arbitrary or capricious as to constitute taking property without due process."

In fact, Congress selected two separate procedures: (1) the far-reaching regulatory provisions of the Act other than Section 11(b)(1); and (2) divestment of existing property holdings under that section.

The "policy" of the Act, as stated in subdivision (c) of Section 1 (quoted *supra*, pp. 27-30) was "to meet the problems and eliminate the evils as enumerated in this section, connected with public utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; * * *". These "evils", or "abuses" as they are called elsewhere in subdivision (c), are those enumerated in the five numbered paragraphs of subdivision (b) of Section 1. We here summarize

below in the left-hand column the "evils" or "abuses" so found by Congress and in the right-hand column the elimination thereof through the regulatory provisions of the Act other than Section 11(b)(1). The constitutionality of these truly regulatory provisions is not here in issue, and as a practical matter regulation thereunder has now for nearly six years been accepted by petitioner and all other important public utility holding companies in the United States.

Abuses Enumerated in Section 1 of the Act:	*Regulation:*
1. Inadequate information for investors (Section 1(b)(1))	Section 5 of the Act provides that upon registration a holding company must file complete information about itself and all of its subsidiaries. Section 7 prohibits a holding company or a subsidiary from issuing securities unless detailed information is filed with the Commission. Section 10 prohibits the acquisition of securities, utility assets or other interest without Commission approval and the filing of detailed information. Section 14 requires a holding company to file annual, quarterly "and other periodic and special reports" ordered by the Commission by rule or regulation. Under Section 22 the information so filed shall be made available to the public unless the Commission otherwise directs. Section 15 provides that registered holding companies and subsidiaries shall maintain accounts and records as prescribed by the Commission.

Abuses Enumerated in Section 1 of the Act:	*Regulation:*
2. Unregulated issue of securities (Section 1(b)(1))	Sections 6 and 7 of the Act prohibit the sale of securities unless approved by the Commission.
3. Security issues on capitalization of fictitious values (Section 1(b)(1))	Section 7(d) provides that the Commission shall not permit the sale of securities unless it finds that the security is reasonably adapted to the earning power of the issuing company and that the financing is necessary or appropriate to the economical and efficient operation of its business.
4. Security issues on overcapitalization to prevent voluntary rate reduction (Section 1(b)(1))	In addition to Section 7 which prohibits holding companies and subsidiary companies from issuing securities without Commission approval, Section 204, of Part 2 of Title II of the Act prohibits the issue of a security by public utility companies without prior approval of the Federal Power Commission, except when the Company is both organized and operating in a state which regulates security issues.
5. Excessive charges to subsidiary by holding company (Section 1(b)(2))	Section 13 provides that such charges are either prohibited or brought under the regulation of the Commission.
6. Service charges not susceptible of state regulation (Section 1(b)(2))	

Abuses Enumerated in Section 1 of the Act:	*Regulation:*
7. Abuse of control over accounts, rates and dividends of operating companies (Section 1(b)(3))	Accounts of holding companies and subsidiaries are controlled by Section 15. Dividend policies are controlled by Section 12(c). Rates of operating companies are fixed by State Commissions or by the Federal Power Commission under the Federal Power Act.
8. Control of operating companies through disproportionately small investment (Section 1(b)(3))	Apart from Section 11(b)(2) much is being done by the Commission under such sections as 7, 10, 12 and 13 to rectify this type of situation.
9. Growth unrelated to the integration and coordination of related operating properties (Section 1(b)(4))	Further growth is wholly subject to Commission control under Sections 9 and 10. Existing lack of integration and coordination of related operating properties is subject to the power of the Federal Power Commission under Section 202(b) of the Federal Power Act to compel the physical connection of transmission facilities.
10. Lack of economy of managements, etc. (Sections 1(b)(4) and (5))	The Commission asserts broad power to insure economy of management under various sections, notably Section 13, of which (e) gives the Commission jurisdiction over the "costs" of services rendered by an "affiliate", which term (Section 2(a)(11)) includes any officer or director or any other person that the Commission determines has a

Abuses Enumerated in Section 1 of the Act: *Regulation:*

relation to a company such that there is liable to be an absence of "arm's length bargaining."

It is in the light of this background that the means embodied in Section 11(b)(1) is to be appraised. On the decisions of this Court above cited we submit that, in view of the deprivation of property rights and the destruction of values that it inevitably entails, it would not in any case be a legitimate means of carrying out the purpose of the Act. But, even if that contention be not accepted, we submit that, considering the extent to which the congressional purpose has been attained by the regulatory provisions of the Act, and considering the vast destruction of values which would attend the compulsory divestment provided in Section 11(b)(1), the terms of that section are so unreasonable, arbitrary and capricious as to constitute the taking of property without due process of law.

CONCLUSION

The combination of the propositions for which the Commission contends in this case,—(1) that the required relation between the object of the legislation and interstate commerce can be found on considerations as tenuous as those here presented; and (2) that deprivation of property by virtue of a statute so grounded is mere consequential damage infringing no right under the Fifth Amendment,—amounts in substance to denial of any constitutional safe-

guard against arbitrary congressional confiscation of property.

The Order of the Circuit Court of Appeals should be reversed and the Orders of the Commission here under review should be set aside.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
Counsel for Petitioner.

SULLIVAN & CROMWELL,
Of Counsel.

March 25, 1943

APPENDIX A

THE NORTH AMERICAN COMPANY

(Summary of Investments Held at September 30, 1942; Based on Petitioner's Exhibit 425 (R., Vol. X, 3394-5) and R., Vol. VII, p. 2857, Adjusted to Reflect Changes to September 30, 1942)

	Number of shares or principal amount owned by The North American Company	Carrying value at September 30, 1942
Wisconsin Electric Power Company		
Preferred Stock	13,494 shs.	$ 1,349,400.00
Common Stock	2,493,710 shs.	30,868,039.46
Union Electric Company of Missouri		
Common Stock	2,695,000 shs.	61,840,780.70
Laclede Power and Light Company		
Common Stock Voting Trust Certificates		404,040.89
Mississippi River Power Company		
6% Preferred Capital Stock Scrip		62.63
Common Stock		22,522.00
The St. Louis County Gas Company		
Capital Stock	41,000 shs.	4,100,000.00
Washington Railway and Electric Company		
Common Capital Stock	50,197 shs.	10,272,456.27
Participating Units for Deposited Shares	65,233 ctfs.	333,737.94
Capital Transit Company		
Capital Stock	3,012 shs.	274,093.92
5% Notes maturing serially from 1943 to 1946	$120,000	120,000.00
North American Light & Power Company		
$6 Preferred Stock	84,925 shs.	4,157,044.21
Common Stock	5,327,067 shs.	22,211,602.54
5½% Debentures, due July 1, 1956.	$5,623,500	3,791,211.94

THE NORTH AMERICAN COMPANY

(Summary of Investments, continued)

	Number of shares or principal amount owned by The North American Company
Illinois Iowa Power Company (formerly Illinois Power and Light Corporation)	
5% Preferred Stock	4,700 shs.
Common Stock	4,700 shs.
Dividend Arrears Certificates	4,700 ctfs.
The Cleveland Electric Illuminating Company	
Common Stock	1,847,908 shs.
Pacific Gas and Electric Company	
Common Stock	2,002,770 shs.
The Detroit Edison Company	
Capital Stock	297,894 shs.
West Kentucky Coal Company (N. J.)	
7% Cumulative Preferred Stock	
Common Stock	
North American Utility Securities Corporation	
Second Preferred Stock	60,000 shs.
Common Stock	376,151 shs.
60 Broadway Building Corporation	
Capital Stock	
Open Account	
Milwaukee Light, Heat & Traction Company	
Capital Stock	
Associated Music Publishers, Inc.	
Preferred Stock	
3% Note due April 27, 1943	